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No. 86-271

In The

# Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,
*Petitioner,*

*v.*

JUDGE DEE BROWN WALKER, et al.,
*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## RESPONDENT WRIGHT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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October, 1986

## STATEMENT OF QUESTIONS PRESENTED

1. Whether or not the loser of a state court jury trial and the appeals thereof, may obtain review of the state court judgment in a U.S. District Court by bringing suit under 42 U.S.C. § 1983 for an alleged deprivation of procedural due process in the state court trial.

2. Whether or not the *Parratt/Hudson* decisions apply to an alleged denial of procedural due process by a state court judge when the state provides an appellate review process to correct any errors made by the trial judge.

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## RESPONDENT WRIGHT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent John Wright respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Petitioner Pat S. Holloway seeking review of the Judgment in the United States Court of Appeals for the Fifth Circuit which affirmed the Judgment of the District Court in this cause.

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Constitution, Amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

## STATEMENT OF THE CASE

This case has its inception from two consolidated state court cases in which Petitioner Holloway was a Defendant who lost. He appealed from the Judgment against him to the Texas Court of Appeals and lost. He applied to the Texas Supreme Court for a Writ of Error and lost. He applied to this court for a Writ of Certiorari and lost. *Humble Exploration Co. vs. Browning,* 677 S.W. 2d 111 (Tex. App. — Dallas 1984), *opinion on rehearing en banc,* 690 S.W.2d 321 (Tex. App. — Dallas 1985, writ ref'd n.r.e.), *cert. denied,* ___ U.S. ___, 106 S.Ct. 1376 (1985). The case at bar is but one salvo in a relentless collateral attack being waged by Petitioner Holloway against the state court judgment.[1] The

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[1]There have been several other collateral attacks on the state court Judgment. For example, *Gregory, et al., vs. Walker, et al.,* No. CA3-84-0850-H, was filed on May 25, 1984, in the U.S. District Court for the Northern District of Texas. Holloway was a Plaintiff and all Respondents herein were Defendants and the same allegations that are contained in

Respondents in this case are the state trial judge, the Plaintiffs, their attorneys and other participants in the state court case. Respondent Wright was the Court appointed Receiver in the state court case. This suit was brought to have the state court judgment set aside and declared "void and of no force or effect for lack of due process" because the Respondents are all alleged to have conspired against Holloway to "rig" the outcome of the jury trial in violation of 42 U.S.C. § 1983.[2] (A. p. 25).

The Fifth Circuit opinion in this case sets forth a lengthy and accurate summation of facts commencing with the state court litigation; therefore, this summary will be brief and focus only on matters germane to this application for certiorari. *Holloway vs. Walker,* 784 F.2d 1287 (5th Cir. 1986).

The first state court case styled *Browning vs. Holloway,* cause No. 79-9623-I, was filed on September 11, 1979, by the Brownings seeking recovery from Holloway for breach of fiduciary responsibility while he was the Browning family attorney and trustee for the Browning children. On November 19, 1979, Humble and Holloway filed a Chapter 11 Bankruptcy petition and removed the state court case to the

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this suit were set forth as a RICO (18 U.S.C. § 1961) action. The case was dismissed on July 12, 1985, and no appeal was taken. In Cause No. 8066, styled *Jaehne, et al. vs. Starnes, et al.,* filed June 17, 1985, in the 21st Judicial District Court of Lee County, Holloway is one of the Plaintiffs and all Respondents herein with the exception of the APP entities, are Defendants. The vehicle for the collateral attack was a Trespass to Try Title action which also failed. The Supreme Court of Texas held that his case was a collateral attack and as such was impermissible. *Browning vs. Placke,* 698 S.W.2d 362 (Tex. 1985).

[2]Petitioner Holloway has a rather jaundiced view of all members of the judiciary. Judge Walker is not the first judge to fall victim to an accusation of bias and conspiracy from Petitioner Holloway. This accusation has also been levelled at the individual members of the Supreme Court of Texas. *Atchley vs. Greenhill,* 373 F. Supp. 512, affirmed 517 F. 2d 692 (5th Cir. 1975).

U.S. Bankruptcy Court which remanded the case back to state court on January 18, 1980. The second state court case, styled, *Fairway Land Co., et al., vs. Humble Exploration Co. Inc., et al.,* No. 82-5742-I, was filed on May 26, 1982, by a group of investors, including the APP Entities (consisting of the Respondent petroleum companies and partnerships) because Humble had shut-in approximately 150 wells. This suit requested the appointment of a receiver.

The 1979 suit was randomly assigned to Judge Snodgrass and the 1982 suit was randomly assigned by computer to Judge Walker. Judge Walker consolidated the two actions involving Humble and Holloway and appointed John Wright as receiver. Holloway filed a motion for Judge Walker to recuse himself from the case, in which he alleged all the items of bias and conflict of interest contained in this civil rights suit. The motion was heard by a visiting judge and was denied after an extensive evidentiary hearing. The case proceeded to trial before a jury

On November 11, 1982, Judgment was entered granting the Brownings damages from Holloway and a constructive trust over all of the stock of Humble and Sterling Pipeline. Notice of Appeal from the state court judgment was filed on November 24, 1982. This civil rights action was filed on November 18, 1982.

Holloway did not file a supersedeas bond to stay the enforcement of the state court judgment. He converted his Chapter 11 proceeding to a Chapter 7 Bankruptcy proceeding and a Trustee, Don Navarro, was appointed. The trustee refused to turn over the property and the Brownings filed suit to force the trustee to turn over the property. The trustee and Holloway contended that the state court judgment was void for many of the reasons also raised in this case. The U.S. District Court held the state court judgment

was void. The Fifth Circuit reversed and held that the state court proceedings were not void. *Browning vs. Navarro,* 743 F.2d 1069 (5th Cir. 1984).

Holloway's state court appeal proceeded simultaneously with the turnover action in *Browning vs. Navarro* and its appeal in the federal court system. There was nothing "theoretical" about Holloway's opportunity to appeal, nor was the Texas Appellate system "in fact withheld from Holloway," as asserted in the Petition. (Pet. p. 6). Holloway appealed and lost — by his own actions. An understanding of how he lost his state court appeal is helpful since the availability of the appeal is necessary for the application of the *Parratt vs. Taylor,* 451 U.S. 527, 101 S.Ct. 1908 (1981) and the *Hudson vs. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984) holdings.

During the course of Holloway's state court appeal, the U.S. District Court hearing the turnover action held the state court judgment to be void. *Browning vs. Navarro,* No. 83-0380 (N.D. Tex. Dec. 5, 1983). Holloway then moves the state appellate court to abate his appeal to such time as a final decision is rendered in the federal appellate system on the appeal of Judge Sanders' decision that the state court judgment is void. The Brownings move to dismiss the state court appeal since the federal courts appear to be deciding the issue. The Texas Court of Appeals dismisses the appeal, reasoning essentially that Holloway has obtained the relief sought in federal court — i.e. that the state court judgment is void, and continuation of the state court appeal is pointless and expensive:

> Review of the same judgment in both federal and state systems is a twofold hardship that we are unwilling to impose. Nor can we justify proceeding with this appeal

> when the judgment under review has been declared void by the federal courts.

*Humble vs. Browning, supra,* 677 S.W. at 114.

The Texas Court of Appeals also addressed the merits of Holloway's argument that the Federal Bankruptcy Court provisionally remanded the case and could pull it back from state courts at will — the "remand on a leash" theory. The Texas Court of Appeals notes that the trial court's asserted lack of jurisdiction because of the remand provisions was never presented to the trial judge giving him no opportunity to comply with the remand order. This argument was presented for the first time on appeal. The Court of Appeals accepted the federal court decision stating:

> If this interpretation is upheld, we must recognized it as the applicable federal law, but, as a matter of state law, we are not bound to permit parties to trifle with state courts in this fashion.
>
> . . .
>
> Having thus chosen to speculate on the verdict in a trial before Judge Walker, and having lost, appellants should not be permitted to pursue their appeal in this court, asserting 211 points of error in a brief of more than five hundred pages, while, at the same time advancing their "leash" theory in federal court.

*Humble vs. Browning, supra,* 677 S.W.2d at 113.

Holloway filed a motion for rehearing of the dismissal of his appeal which was denied on September 7, 1984. On October 1, 1984, he lost in federal court. The Fifth Circuit reversed and held the state court judgment was *not* void. On October 3, 1984, Holloway moved the state appellate court for relief from its Order dismissing the appeal but his request is too late. *Humble vs. Browning, supra,* 690 S.W.2d 321. He applied for a Writ of Error to the Texas Supreme

Court for review of the Court of Appeals dismissal of his appeal, which was refused, and Holloway then applied for a Writ of Certiorari to this Court for review of the state court's dismissal of the appeal, which was also refused. In his Petition for Certiorari, Holloway placed the issues of deprivation of due process and the alleged bias of the trial court judge before this Court.[3] *Humble Exploration Company vs. Browning, supra.* The Texas appellate courts were no more foreclosed to Holloway than the federal appellate system is to an appellant who relies on a theory and loses or who misses a jurisdictional time limit resulting in the dismissal of his appeal. The motion to abate the appeal in the first instance and the decision to file, untimely, for a rehearing were deliberate strategical choices made by Holloway. (A. p. 16).

Also proceeding simultaneously with the state court appeal and the federal turnover action and its appeal, is the present federal court action. All Defendants filed a Motion for Summary Judgment on the grounds that Plaintiffs' pleadings failed to state a cause of action under 42 U.S.C. § 1983 and that the evidence failed to show an issue of fact regarding their alleged involvement in a conspiracy. The

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[3]One of the Questions Presented by Holloway in the Petition for Certiorari (No. 85-1182) was:

> 1. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of the judgment when Respondents sued to enforce it in federal court.

District Court, on reconsideration of Ayres' Motion for Summary Judgment, granted the summary judgment and dismissed Plaintiffs' claims under 42 U.S.C. § 1983 based on this Court's *Parratt/Hudson* decisions. (A. p. 17). Previous to this Order, on March 11, 1985, the District Court entered an Order holding that it did not have subject matter jurisdiction to review the state court judgment, based on this Court's decision in *District of Columbia Court of Appeals vs. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983) (A. p. 36). Having dismissed Plaintiff's petition, the District Court had no need to reach the remaining Motions for Summary Judgment on the issue of alleged involvement in the conspiracy.[4]

Holloway appealed to the Fifth Circuit Court of Appeals which affirmed the District Court's decision to grant summary judgment and dismiss the case. (A. p. 16).

## SUMMARY OF THE ARGUMENT

A grant of certiorari to render a decision on the constitutional question presented is wholly unnecessary to the resolution of this case since the District Court did not have subject matter jurisdiction to review a state court case which is "inextricably intertwined" with the 42 U.S.C. § 1983 action. *District of Columbia Court of Appeals vs. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983).

The Fifth Circuit followed this Court's *Parratt/Hudson* decisions to correctly determine that Petitioner failed to state a cause of action under 42 U.S.C. § 1983 based on a

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[4]Prior to its Order of April 18, 1985, dismissing the case, the District Court did not reach the earlier Motion for Summary Judgment filed by the Brownings and entered an Order on March 28, 1985, granting the Brownings summary judgment because "Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Brownings Interests." (R. p. 1990).

denial of due process since process still existed in the form of an appeal which constituted an adequate post-deprivation remedy. The decision in this case follows the *Parratt/Hudson* cases dealing with when a Section 1983 cause of action exists and it does not conflict with the decision in *Aetna Life Insurance Co. vs. Lavoie,* ___ U.S. ___, 106 S.Ct. 1580 (1986), which is applicable to a direct appeal to the U.S. Supreme Court of a state court judgment on due process grounds.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### I. THIS COURT SHOULD NOT GRANT CERTIORARI TO PASS ON A CONSTITUTIONAL ISSUE WHEN THE COURT OF APPEALS DECISION IS CORRECT FOR NON-CONSTITUTIONAL REASONS AS WELL.

The granting of a Writ of Certiorari in this case would impinge on the deeply rooted doctrine of constitutional adjudication that questions of constitutionality should not be passed on unless such adjudication is unavoidable. *Jean vs. Nelson,* ___ U.S. ___, 105 S.Ct. 2992, 2997 (1985). Adjudication of a constitutional issue is avoidable in this case since the Court of Appeals affirmed the District Court's judgment which, in addition to the *Hudson/Parratt* constitutional reasons, set forth in its Order of March 4, 1985 (A. p. 24), the additional reason for dismissal of the claims of lack of subject matter jurisdiction to review a state court judgment. *District of Columbia Court of Appeals vs. Feldman,* 460 U.S. 462, 103 S.Ct. 1303 (1983). Holloway's Complaint in the District Court sets forth a myriad of the rulings, orders and actions taken by Judge Walker and pleads them to show that the conspiracy actually existed *because* those rulings and orders were improper. The Complaint details every

action taken in the trial, from evidentiary objections through all actions taken during the trial to final judgment. The pleading is replete with allegations such as:

> Walker repeatedly made favorable comments on the law to the jury which were legally *erroneous.* (R. Vol. 10, "A", par. 118, p. 36).
>
> Walker . . . threatened Plaintiff's attorneys with contempt for *no* apparent or *valid reason* (R. Vol. 10, "A", par. 119, p. 37).
>
> . . . Such line of questioning was wholly *irrelevant* to any issue in the case and was *highly prejudicial* to Plaintiffs. (R. Vol. 10, "A", par. 123, p. 37).
>
> . . . Walker's numerous *favorable rulings* on Defendant Brownings issues and instructions amounted to an instructed verdict in their favor. (R. Vol. 10, "A", par. 135, p. 40).
>
> . . . Walker's *adverse* rulings . . . *deprived* them of a meritorious defenses. (R. Vol. 10, "A", p. 136, p. 40).

These are but a few of the "foregoing acts and omission" by which Defendants are accused of violating 42 U.S.C. § 1983. (R. Vol. 10, "A", p. 46). These are the acts which are alleged to have caused the deprivation of property. Were these "acts and omissions" by the trial judge proper or improper under the circumstances of the state court case. This was the question posed to the Texas Court of Appeals *and* posed to District Judge Sanders in the federal court case which is the subject of this Petition for Certiorari. The very acts alleged as evidence and causation of a civil rights deprivation are errors of law raised on appeal. As the District Court pointed out: "Virtually all of these matters, including the allegation of bias, are among the 211 points of

error argued on appeal from the state court trial." The District Court went on to actually correlate the paragraphs of the Complaint to the respective points of error. (A. p. 30).

The U.S. District Court is asked to review not only the propriety of every action taken in the state trial court but is also asked, per force, to review the propriety of the Texas Court of Appeals' dismissal of the appeal which contained points of error that are germane to the federal cause of action. As stated by this Court in *District of Columbia vs. Feldman, supra,* 103 S.Ct. at 1315:

> . . . a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be heard only in this Court.

Holloway sought such a permissible review of the state court judgment by Petition for Writ of Certiorari to this Court but this Court declined to hear his case. Holloway cannot now achieve indirectly what this Court refused to do directly when it denied his Petition for Certiorari. Cloaking a complaint in 18 U.S.C. § 1983 allegations does not circumvent this restriction. *Hagerty vs. Succession of Clement,* 749 F.2d 217 (5th Cir. 1984).

In *Howell vs. State Bar of Texas,* 674 F.2d 1027 (5th Cir. 1982), 460 U.S. 1065, 103 S.Ct. 1515 (1983), opinion on remand 710 F.2d 1075 (5th Cir. 1983), this Court granted certiorari and remanded the case back to the Fifth Circuit for consideration in light of its decision in *Feldman.* The Plaintiff filed a federal court § 1983 action seeking declaratory and injunctive relief from a state bar disciplinary action against him in state district court, alleging that the state bar disciplinary scheme was unconstitutional, per se, and that in his proceeding he was denied the right to a jury as well as

the right to a fair trial. The court upheld the district court's dismissal for want of jurisdiction to all his claims except the direct attack on the constitutionality of the state disciplinary scheme, stating:

> In this instant case, all but one of the constitutional claims Howell presented to the district court are "inextricably intertwined" with the Texas State Court's reprimand of Howell in a judicial proceeding. For example, he alleged that he was deprived of his right to a jury trial as well as his right to a fundamentally fair trial. With respect to these claims, Howell has done nothing more than ask the district court to sit as an appellate court and review the state court judgment. As the Supreme Court has perfunctorily stated, "(t)his the District Court may not do."

*Howell, supra,* 710 F.2d at 1077.

In the present case, Petitioner Holloway's constitutional claims are so "inextricably intertwined" with the state court proceeding that the District Court is in essence being called upon to review the state court decision — which the District Court may not do. *District of Columbia vs. Feldman, supra,* 103 S.Ct. at 1315 n. 16.

Since the District Court did not have subject matter jurisdiction, regardless of the constitutional claims, this Court need not grant a Writ of Certiorari to review the constitutional issues.

## II. THE ISSUES PRESENTED IN THIS CASE ARE CONTROLLED BY THIS COURT'S DECISIONS IN *PARRATT VS. TAYLOR AND HUDSON VS. PALMER.*

The Fifth Circuit correctly applied the decisions in *Parratt vs. Taylor,* 456 U.S. 527, 101 S.Ct. 1908 (1981), and

*Hudson vs. Palmer,* 468 U.S. 517, 104 S.Ct. 3194 (1984), to determine that there was no denial of due process since process still existed in the form of an appeal; and, therefore, Holloway had failed to establish the requisite deprivation necessary to sustain a 42 U.S.C. § 1983 action.

The holding in *Hudson* is succinct and unambiguous that an intentional deprivation of property by a state actor does not give rise to a violation of the due process clause if the state provides an adequate post deprivation remedy. *Hudson, supra,* 104 S.Ct. at 3204, n. 14.

The instant case meets all elements of the *Hudson* rule and its supporting rationale. The complaint is for alleged violations of procedural due process emanating from the action of the state judge rather than from established state custom, policy or procedure. In fact, the gravamen of the Complaint is that the state judge allegedly did *not* follow authorized state procedures.

This distinction between a deprivation caused by the "random and unauthorized" misconduct of a state actor, as opposed to a deprivation caused by "conduct pursuant to established state procedures", is the basis for the application of the *Parratt* and *Hudson* holdings, as opposed to the holding in *Logan vs. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 1148 (1982) which makes the availability of a post deprivation remedy irrelevant to the question of whether a deprivation has occurred.

The availability of a state remedy is essential to the determination of whether or not there has been a violation of procedural due process even though it is not a factor in determining the existence of a violation of substantive due process. When the deprivation occurs by official state policy or custom, the substantive due process violation is complete

and the availability of a state remedy is ancillary to a 42 U.S.C. § 1983 action and need not be exhausted prior to bringing a 42 U.S.C. § 1983 action. *Patsy vs. Board of Regents of the State of Florida,* 457 U.S. 496, 102 S.Ct. 2557 (1982). But when procedural due process is involved, the essence of the violation is the lack of procedure and the violation simply does not exist unless the state refuses to provide a suitable post deprivation remedy. *Hudson, supra,* 104 S.Ct. at 3204.

That an impartial and disinterested tribunal is procedural rather than substantive due process is not a new concept espoused for the first time by the Fifth Circuit in this case, rather it is the position of this Court. *Marshall vs. Jerrico,* 446 U.S. 238, 243, 100 S.Ct. 1610, 1613 (1980). Even Professor Tribe places the decision of a neutral and impartial tribunal in his section discussing procedural due process. L. Tribe, *American Constitutional Law,* p. 512, (1978).

In deciding whether the state provided due process, the court need only determine whether the state provided an adequate post-deprivation remedy, not whether the Petitioner made effective use of the state remedy. Furthermore, the available state remedy need not provide all the relief which might be available under 42 U.S.C. § 1983 to be adequate for due process purposes. *Parratt, supra,* 451 U.S. at 543, 101 S.Ct. at 1917. Petitioner cannot create a § 1983 claim by ignoring, waiving or losing his available state remedies by intentional or negligent failure to meet required state procedures as he has done in this case. The appeal available to Petitioner had the potential to restore the entire amount of property of which he was allegedly deprived.

## III. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *AETNA LIFE INS. CO. VS. LAVOIE.*

There is a difference between a direct appeal of a final judgment from the highest state court to the U.S. Supreme Court for review of that judgment to determine if its rendition comports with due process and a suit brought under 42 U.S.C. § 1983 seeking review in a U.S. District Court of the state trial court's judgment and alleging a violation of due process in the rendition of the trial court judgment. That is the difference between this case and *Aetna Life Insurance Co. vs. Lavoie,* ___ U.S. ___, 106 S.Ct. 1580 (1986).

*Lavoie* involved a direct appeal from a judgment of the Alabama Supreme Court in which one of the Justices had a direct interest in the outcome of the case. A motion for recusal was filed and denied. The decision to recuse was a matter left to the individual justice involved to decide for himself. After reviewing the circumstances of the Justice's involvement and interest in the outcome of the case, this Court vacated the state court judgment because the judge's participation denied the Petitioner due process. Had this Court granted Petitioner Holloway's application for certiorari from the state court case, then that judgment and the allegations of the judge's bias and interest would have been governed by a *Lavoie* analysis. Holloway properly raised the due process constitutional issue at the state level and presented it to this Court for review, which this Court declined to do.

The inquiry necessary to sustain the present § 1983 case is whether or not a deprivation without due process has in fact occurred when an appeal to rectify any error or due process violation is still available — i.e. the *Hudson* inquiry.

Simplistically put, the state is still in the process of providing the process that is due by means of the appeal. Following Petitioner's view of *Lavoie,* every erroneous ruling by a trial judge that implicated the due process clause would give immediate rise to a 42 U.S.C. § 1983 action in federal court. That action would remain viable based solely on the occurrence of an erroneous ruling even though ultimately there was no deprivation of property due to the actual outcome of the case or reversal on appeal. It is only where the state judicial *system* has failed to provide due process that *Lavoie* is controlling. *Lavoie* determines whether the due process clause has been violated whereas *Hudson* determines when a cause of action is stated under 42 U.S.C. § 1983 for a procedural due process violation. Had the biased judge in *Lavoie* been a lower court judge and had the Alabama Supreme Court reversed, there would not have been an appeal to the U.S. Supreme Court, and furthermore there would be no § 1983 action either because of *Hudson.* The constitutional right to a fair trial is secured through the right to appeal in the state court system and through direct review by this Court. The Fifth Circuit has in no way jeopardized this right.

Neither is the Fifth Circuit at odds with *Dennis vs. Sparks,* 449 U.S. 24, 101 S.Ct. 183 (1980), which was a narrow holding that "under color of state law" included those acting in concert with a state judge even though the state judge was immune. It is only by implication, since *Dennis* was a Section 1983 case, that such a complaint was a viable § 1983 action. The issue was never discussed by this Court or any lower court, therefore, there is no conflict with the *Hudson* doctrine as applied to this case. *Dennis* was decided in 1980 and *Hudson* was decided in 1984. Constitutional law is not stagnant, it is a continuously evolving body of law. *Daniel vs. Williams, supra,* decided in 1986, overruled the

entire negligence concept of *Parratt* decided in 1981. Likewise, the Fifth Circuit followed the evolving concept of when state action in regard to due process is complete for purposes of alleging a § 1983 cause of action as set forth in the most recent decision in *Hudson.*

## IV. THE FIFTH CIRCUIT CORRECTLY FOLLOWED THE *PARRATT/HUDSON* DECISIONS RATHER THAN DECISIONS OF ANOTHER CIRCUIT.

Conflicts in the holdings between different circuits is an important consideration for a grant of certiorari when this Court has not addressed the issues and needs to resolve the conflicting views. But, certiorari should not be granted when the issue has been decided by this Court and the case up for review has followed the decision of this Court even though another circuit has not. See *National Ass'n of Greeting Card Publications vs. U.S. Postal Services,* 462 U.S. 810, 103 S.Ct. 2717 (1983).

In *Bretz vs. Kelman,* 773 F.2d 1026 (9th Cir. 1985) (en banc), the Plaintiff who was arrested, tried and acquitted of a burglary charge brought a 42 U.S.C. § 1983 action, alleging that the police, prosecutors and witnesses all conspired to deprive the Plaintiff of his liberty. At issue was the arrest allegedly made in bad faith. The Court's decision turned on its own interpretation that *Parratt/Hudson* was restricted to "minor deprivations" of a property interest. To be sure, this Court has not addressed whether *Parratt/Hudson* extends to intentional deprivations of liberty interests as well as of property interests, but there is no limitation of its application to only *minor* property interests.[5]

[5]The negligent/intentional and property/liberty distinctions are receding with each decision of this Court, the most recent of which mooted any necessity to distinguish between a property or liberty interest in regard to

While the Fifth Circuit has applied *Parratt/Hudson* to a liberty interest in *Augustine vs. Doe,* 740 F.2d 322 (5th Cir. 1984), a liberty interest is not at issue in this case and reconciliation of the Circuits' conflict in that regard will have to await another day where a liberty interest case is before this Court.

The *Bretz* court also based its decision on the concept that a conspiracy, because of its intentional and planned aspect, can never be a "random" act. This is totally contrary to the *Hudson* decision which addressed itself specifically to intentional acts of state employees. Finally, the *Bretz* court followed the *Logan* line of cases because it mistakenly believed that *Logan* applied to an abuse of the state process. As the Fifth Circuit pointed out when it declined to follow *Bretz, Logan* addresses itself to a state procedure that is inadequate, per se, not to a state procedure that becomes inadequate because it is not followed or abused. This distinction being the heart of the *Parratt/Hudson* decision.

*Patterson vs. Coughlin,* 761 F.2d 886 (2d Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S.Ct. 879 (1986), also involved an intentional deprivation of a liberty interest when an inmate was placed in isolation for 65 days pursuant to a hearing in which the hearing officer failed to follow the state's own rules. The Second Circuit declined to follow *Parratt/Hudson* because it held that the deprivation was neither "random" or "unauthorized" when "viewed from the position of one who possesses the state-delegated authority to grant a hearing" *Id.* 761 F.2d at 892. *Hudson* itself refutes such an argument. No act can be "random" or "unauthorized" if viewed through the eyes of the state employee intent on departing

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a negligent act since the Due Process Clause is no longer implicated at all by negligence. *Daniel vs. Williams,* ___ U.S. ___, 106 S.Ct. 662 (1986).

from state procedure. The act is, however, "random and unauthorized" if viewed through the eyes of the state which has established the procedures. In this case the appellate process was available and ". . . post deprivation procedures satisfy due process because the *State* cannot possibly know in advance of a negligent [intentional] deprivation of property." *Hudson, supra,* 104 S.Ct. at 3204. It is only when state rules are systematically ignored that *Parratt/Hudson* does not apply. This is in keeping with this Court's requirement that for the state, per se, to be liable, the employees' actions must be taken pursuant to an established "policy or custom." *Monell vs. Dept. of Social Services of City of New York,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037 (1978).

This Court has just refused to review one of the most recent applications of *Parratt/Hudson* to a situation analogous to this case, in which was upheld a dismissal of a 42 U.S.C. § 1983 action against members of the state regulatory commission for malicious abuse of the hearing process. *National Communications Systems, Inc. vs. Michigan Public Service Commission,* 789 F.2d 370 (6th Cir. 1986) *cert. denied* 55 USLW 3235, (U.S. Oct. 6, 1986) (No. 86-138). The Fifth Circuit followed and applied the very heart of the *Parratt/Hudson* decision in this case rather than letting itself be led astray by the *Bretz* and *Patterson* decisions that strain logic to avoid the application of *Parratt/Hudson.*

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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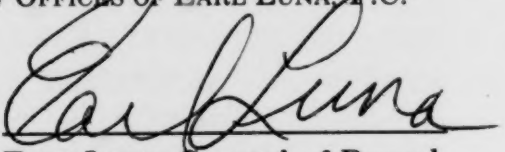
By: 

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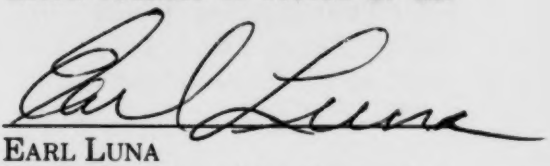
## CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Respondent John Wright and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondent Wright's Brief in Opposition to Petition for Certiorari on all parties required to be served, by depositing three copies of Respondent Wright's Brief in Opposition to Petition for Certiorari in the United States mail, on this 21st day of October, 1986, with first-class postage, addressed to the listed counsel of record at the address indicated.



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